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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 37

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, A CORPORATION,

Petitioner,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, AND JAMES H. STEWART, JOHN J. GREENE, AND SAM D. GOZA, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA AND BRIEF IN SUPPORT THEREOF.

E. K. CHEADLE, JR.,
E. J. McCABE,
H. C. HALL,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 953

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, A CORPORATION,

Petitioner,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, AND JAMES H. STEWART, JOHN J. GREENE, AND SAM D. GOZA, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA,

Respondents;

THE BLACKFEET INDIAN TRIBE,

Intervener.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

To the Honorable the Supreme Court of the United States:

The petitioner, The British-American Oil Producing Company, prays that a writ of certiorari issue to review the original judgment and decree of the Supreme Court of the State of Montana, entered in the above entitled cause, and

entered on its docket as cause No. 7505, on the 19th day of February, 1936 (R. 49), pursuant to the decision of said court entered in said cause on the 22nd day of January, 1936 (R. 25, 54 Pac. (2d) 129).

Questions Presented.

1. Whether the interest of petitioner, as lessee, and the royalty interest of the Blackfeet Indian Tribe in oil produced from lands included in the Blackfeet Indian Reservation and allotted by trust patents to Indians of such Tribe, under leases executed under the provisions of the Act of June 30, 1919 (41 Stat. 3-17), may be taxed by the State of Montana, where the oil, gas and other minerals have been reserved to the United States by such trust patent for the benefit of the Blackfeet Indian Tribe.

2. Whether the consent given by the United States to the taxation of oil produced from leases of unalloted Indian lands (Act of May 29, 1924, 43 Stat. 244), applies to oil produced from leases embracing lands allotted to individual Indians under trust patents which reserve to the United States, for the benefit of the Blackfeet Indian Tribe, the oil, gas and other minerals in and under such lands as provided in the Act of June 30, 1919 (41 Stat. 3-17).

Statutes Involved.

(a) Federal Statutes.

Act of June 30, 1919 (41 Stat. 17):

> "the Secretary of the Interior is authorized to make allotments under existing laws within the said Reservation to any Indians of said Blackfeet Tribe not heretofore allotted. * * *
>
> Provided, That of the lands so allotted eighty acres of each allotment shall be designated as a homestead

by the allottee and be evidenced by a Trust Patent and shall remain inalienable and non-taxable until Congress shall otherwise direct; * * *

Provided further, That any and all minerals, including coal, oil and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly; Provided, That the land containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

Act Feb. 28, 1891, 26 Stat. 795, U. S. C. A., Sec. 397, Title 25:

"Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed * * * ten years for mining purposes * * *."

Act May 29, 1924, 43 Stat. 244, U. S. C. A., Sec. 398, Title 25:

"Unallotted lands on Indian Reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under section 397 of this Title, may be leased * * * for oil and gas mining purposes * * *

Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands * * *."

Enabling Act, Montana, February 22nd, 1889, Sec. 4, Sub. 2:

> "and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

(b) State Statutes and Constitutional Provisions.

Ordinance No. I, Sec. 2:

> "that no taxes shall be imposed by the State of Montana on lands or property therein belonging to, or which may hereafter be purchased by the United States or reserved for its use."

Constitution, Art. XII, Sec. 2:

> "The property of the United States shall be exempt from taxation."

Laws 1931, Chap. 98:

> "The property of the United States * * * (is) exempt from taxation."

Net Proceeds Tax.

Laws 1935, Chap. 188:

> "SECTION 5. On or before the fifteenth day of June in each year the State Board of Equalization shall transmit to the County Clerk of each county in which such mines and mining claims are situated, the valuation of the net proceeds of such mines and mining claims for the purpose of taxation, as the same have been determined and fixed by such State Board of Equalization, and the County Clerk shall immediately enter the same upon an assessment roll."

> "SECTION 6. At the time of transmitting net proceeds assessments the State Board of Equalization shall also transmit the royalty lists or schedules to the County Clerk of each county in which such mines and mining-

claims are located and thereupon the County Clerk shall prepare from such net proceeds and royalty assessments a tax roll which shall be by him furnished to the County Treasurer on or before the twentieth day of August following, upon which date said taxes shall be due and payable. The County Clerk shall enter such assessments in the personal property assessments book under the name of the operator of such mine or mines, and such assessments when entered shall have all the force and effect as if made in the names of the owners of such royalty individually as well as against the operator. The County Treasurer shall proceed to give full notice thereof to such operator and to collect the same in manner provided by law. The operator or producer shall be liable for the payment of said taxes, and the same shall be payable by, and shall be collected from, such operators in the same manner and under the same penalties as provided for the collection of taxes upon net proceeds of mines; provided, however, that after payment of such tax such operator may recover or withhold from any proceeds of royalty interest, either in kind or in money, coming into his hands, the amount of any tax paid by him upon such royalty or royalty interest."

Laws 1925, Chap. 143:

"The taxes on such net proceeds must be levied as the levy of other taxes are provided for, and every such tax is a lien upon the mine or mining claim from which the ore or mineral products or deposits are mined or extracted, and is a prior lien upon all personal property and improvements used in the process of extracting such ore or mineral products or deposits."

Gross Proceeds Tax.

Laws 1923, Chap. 67, Sec. 1:

"Every person engaging in or carrying on the business of producing, within this state, petroleum, or other mineral or crude oil, or engaging in or carrying on the

business of owning, controlling, managing, leasing or operating within this state any well or wells from which any merchantable or marketable petroleum or other mineral or crude oil is extracted or produced, sufficient in quantity to justify the marketing of the same, must, for the year 1923, and each year thereafter, when engaged in or carrying on any such business in this state, pay to the state treasurer, for the exclusive use and benefit of the State of Montana, a license tax for engaging in and carrying on such business in an amount equal to two per centum of the total gross value of all petroleum and other mineral or crude oil produced by such person within this state during such year."

Summary Statement of the Matter Involved.

This proceeding was instituted originally in the Supreme Court of Montana by petitioner to prevent the assessment, levy and collection of certain taxes by the State of Montana based upon crude oil produced, under an oil and gas lease, from lands situated on the Blackfeet Indian Reservation, allotted under Trust Patents by the terms of which the oil, gas and other minerals in and under such lands were reserved to the United States for the benefit of the Blackfeet Indian Tribe, pursuant to the provisions of the Act of June 30, 1919 (41 Stat. 17). The oil and gas lease involved was executed by the Superintendent of the Reservation on behalf of the Tribe, and was approved by the Secretary of the Interior. The Board of Equalization of Montana seeks to assess, levy and collect certain taxes on crude oil produced by petitioner under said lease during the years 1934 and 1935, as follows:

(a) Gross Production Tax (a license or occupational tax) provided for by Secs. 2397-2405, Revised Codes of Montana, 1921, as amended.

(b) Net Proceeds Tax on lessor's and lessee's interest (a substitute for an *ad valorem* tax on the value of the

lease), provided for by Secs. 2088-2096, Revised Codes of Montana, 1921, as amended.

The complaint alleges that on July 10, 1934, the United States of America, for the benefit of the Blackfeet Tribe of Indians, was the owner of the oil, gas and other minerals in and under the land involved, and that on said date such oil and gas were leased by the Superintendent of the Blackfeet Agency to petitioner's predecessor; that during the years 1934 and 1935 petitioner produced crude oil from wells drilled on said premises; that the defendants are attempting to assess, levy and collect the above described taxes on such production; that such taxes are based upon crude oil produced by petitioner as an instrumentality and agent of the United States not taxable by the State of Montana. Defendants' demurrer admits the facts alleged. It was stipulated by counsel for both parties that all of the lands embraced in the lease were granted to individual Indians by Trust Patents under the provisions of the Act of June 30, 1919 (41 Stat. 17), in form identical with the Trust Patent attached to such stipulation (R. 23).

The *complaint in Intervention of the Blackfeet Tribe* seeks to prevent the levy, assessment, and collection of a net proceeds or royalty tax on the royalty interest of the Tribe, as depriving the Tribe of property without due process of law in violation of the provisions of the Constitution of the United States, as impairing the obligations of contracts, treaties and agreements between the Tribe and the United States, and between the United States and the State of Montana, in violation of the Constitutions of the United States and the State of Montana, and that such taxes would constitute a direct burden upon property of the United States.

The decision of the Supreme Court of Montana sustained defendants' demurrers to the complaint and complaint in

intervention and dismissed the complaint and complaint in intervention on the merits (R. 25 and 36).

Motion for rehearing was denied (R. 49).

Judgment and decree is in accordance with the decision, and sustained the defendants' demurrers and dismissed the complaint and complaint in intervention (R. 49-50).

Rulings of the Court Below.

With respect to the questions here presented, the Montana Supreme Court

(a) Concluded that the interests of the lessor and the lessee in oil produced from lands in the Blackfeet Indian Reservation and allotted by Trust Patents to individual Indians, under leases executed under the provisions of the Act of June 30, 1919 (41 Stat. 17), which Act reserved the oil, gas and other minerals therein to the United States, may be taxed by the State of Montana (R. 25 and 26).

(b) Decided that the consent given by the Congress of the United States to the State taxation of oil produced from leases of unallotted Indian lands (Act of May 29, 1924, 43 Stat. 244) applies to and includes oil produced from leases embracing lands alloted to Indians under Trust Patents which reserve to the United States, for the benefit of the Blackfeet Indian Tribe, the oil, gas and other minerals in said lands under the provisions of the Act of June 30, 1919 (41 Stat. 3-17) (R. 25 and 36).

(c) Decided that as to the oil, gas and other minerals in the lands involved, which were reserved to the United States for the benefit of the Blackfeet Tribe under the provisions of the Act of June 30, 1919 (41 Stat. 17), said lands are unallotted, and that the lease embracing the same was executed under and governed by the provisions of the Act of May 29, 1924 (43 Stat. 244, Sec. 398, Title 25, U. S. C. A.),

and therefore taxable by the State of Montana (R. 25 and 36).

(d) Decided that the lands embraced in the involved lease were allotted to individual Indians under the provisions of the Act of June 30, 1919 (41 Stat. 3-17), but that the lease was executed under the provisions of the Act of May 29, 1924 (43 Stat. 244, Sec. 398, Title 25, U. S. C. A.) (R. 25 and 36).

(e) Decree and judgment was entered sustaining defendants' demurrers to the complaint and complaint in intervention and dismissing the complaint and complaint in intervention.

Reasons for Granting the Petition.

1. Unless specific consent is given by the United States to the taxing of oil reserved to the United States for the benefit of the Blackfeet Indian Tribe, no such tax may be assessed or levied by the State of Montana.

Gillespie v. *State of Oklahoma,* 257 U. S. 501, 66 L. Ed. 338;

Howard v. *Gypsy Oil Co.,* 247 U. S. 503, 62 L. Ed. 1239.

2. No consent to such taxation by the State of Montana, specific or otherwise, is found in the Act of June 30, 1919 (41 Stat. 3-17), under the provisions of which the oil was reserved to the United States and the lease here in question authorized.

3. Section 398, Title 25, U. S. C. A. (Act of May 29, 1924, 43 Stat. 244), is not applicable to either the lands here involved or the oil produced therefrom, for the reason that such lands are neither unallotted, nor are they lands such as are described by Section 397, U. S. C. A., Title 25, to which Section 398 refers. The Supreme Court of Montana based its decision permitting the taxes here involved upon

the consent given by Section 398. If that section is not applicable the decision and decree of the Supreme Court of Montana is without basis and should be reversed.

4. The exact question here presented has never been passed upon by this Court or any Federal Court of Appeal, although the application and construction of Federal statutes is involved. However, the decision of the Supreme Court of Montana is in apparent conflict with the decisions of this Court holding that neither the lands, the lease, nor the oil produced therefrom may be taxed by the State.

Gillespie v. *State of Oklahoma*, 257 U. S. 501, 66 L. Ed. 338;

Indian Terr. Oil Co. v. *Oklahoma*, 240 U. S. 522, 60 L. Ed. 779;

Howard v. *Gypsy Oil Co.*, 247 U. S. 503, 62 L. Ed. 1239;

Large Oil Co. v. *Howard*, 248 U. S. 549, 63 L. Ed. 416.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Montana, commanding that court to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7505, The British-American Oil Producing Company, a corporation, Plaintiff, *vs.* The Board of Equalization of the State of Montana, and James H. Stewart, John J. Greene, and Sam D. Goza, Members of the State Board of Equalization of the State of Montana, Defendants; the Blackfeet Indian Tribe, Intervener, and that said judgment of the Supreme Court of the State of Montana may be reversed by this Honorable Court, and

that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE BRITISH-AMERICAN OIL
PRODUCING COMPANY,
By E. K. CHEADLE, JR.,
E. J. McCABE,
Counsel for Petitioner.

H. C. HALL,
Of Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

The decision sought to be reviewed was rendered on January 22, 1936, and is reported in 54 Pac. (2d) 129. It has not been published in the Montana Reports (R. 25). Judgment and decree was entered on February 19, 1936 (R. 49).

II.

Jurisdiction.

The petition for rehearing was denied by the Montana Supreme Court on February 8, 1936 (R. 49), and application for writ of certiorari filed within three months thereafter (U. S. Code, Title 28, Sec. 350.)

The jurisdiction of the Supreme Court is conferred by sub-division (b) of Sec. 237 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 344).

III.

Statement of the Case.

A statement of the case appears in the petition under the heading "Summary Statement of the Matter Involved."

IV.

Specifications of Error.

1. The Supreme Court of Montana erred in sustaining respondents' demurrers to petitioners complaint and to the complaint in intervention of the Blackfeet Tribe, and dis-

missing said complaint and complaint in intervention in this, that its opinion and judgment disregarded the leasing provisions found in the Act of June 30, 1919 (41 Stat. 17), which specifically provide the manner in which the minerals in the lands which were allotted pursuant to that Act shall be leased, that is, under such terms and conditions as the Secretary of the Interior shall prescribe.

2. The Supreme Court of Montana erred in dismissing petitioners complaint and the complaint in intervention of the Blackfeet Tribe in this, that by its opinion and judgment said court determined and held that the lands embraced in the involved lease, so far as the oil, gas and other minerals therein are concerned, are unallotted lands in an Indian Reservation, and, therefore, that the lease embracing the same was executed pursuant to the provisions of the Act of May 29, 1924 (43 Stat. 244, Sec. 398, Title 25, U. S. C. A.), and accordingly that such oil and gas are taxable by the State of Montana by virtue of the Congressional consent contained in that Act.

3. The Supreme Court of Montana erred in sustaining respondents demurrers to petitioners complaint and the complaint in intervention of the Blackfeet Tribe, and dismissing said complaints, in this, that its opinion and judgment permit taxation by the State of Montana of property of the United States, and the taxing of an instrumentality of the United States.

V.

ARGUMENT.

A.

The involved lease was executed pursuant to the provisions of the Act of June 30, 1919 (41 Stat. 17), and not pursuant to the Act of May 29, 1924 (43 Stat. 344).

The lands embraced in the lease in question were allotted to individual Indians pursuant to the provisions of the Act of June 30th, 1919 (41 Stat. 3-17), which reserved the oil, gas and other minerals therein to the United States for the benefit of the Blackfeet Tribe. This Act specifically provides the manner of leasing the reserved minerals, by this proviso: "Provided, that the land containing such minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

The Montana Supreme Court held that as to the minerals, reserved to the United States under this Act, these lands are unallotted, and, therefore, the lease embracing same was executed under, pursuant to and governed by the Act of May 29, 1924 (43 Stat. 244), which makes provision for the leasing of *unallotted* lands in certain Indian Reservations, subject to mining purposes, and contains congressional consent to the imposition of taxes on the production therefrom by the States. In this the court erred, because

(a) The lands involved are not "unallotted" lands within the purview of the Act of May 29, 1924 (43 Stat. 244). This Act pertains only to lands subject to lease for mining purposes for a period of ten years under the Act of February 28, 1891 (26 Stat. 795, Sec. 397, Title 25, U. S. C. A.). This latter section applies only to the leasing for a period

not exceeding ten years, for mining purposes, of lands occupied by Indians which are not needed for farming or agricultural purposes and are not desired for individual allotments.

(b) These lands are "allotted" lands, as shown by the stipulation (R. 22). Had Congress meant, by the Act of May 29, 1924, to define "unallotted" lands as "allotted" lands, the minerals in which were reserved to the United States, it would have made clear its intention. Had this Act been intended to include lands, the surface of which was allotted, logically the lease would have provided for reimbursement to the Indian owner for damages occasioned to fences, buildings, crops, etc., by reason of operations for oil and gas development. No such provision is found in the lease.

So far as concerns leasing for oil and gas purposes, land in the Blackfeet Reservation is classified either as: (1) unallotted tribal lands; (2) lands allotted in trust; (3) lands allotted in trust as to which the oil, gas and other minerals have been reserved under the provisions of the Act of June 30, 1919 (41 Stat. 3-17). Federal statutes expressly provide for leases embracing each of such classes. Thus lands allotted in trust without a reservation of the minerals are authorized to be leased under the provisions of Sec. 396, U. S. C. A. (35 Stat. 783).

Santa Rita Oil & Gas Co. v. *State Board of Equalization*, — Mont. —, 54 Pac. (2d) 117.

Leases to embrace unallotted lands are authorized by Sec. 398, Title 25, U. S. C. A. (43 Stat. 244). The leasing of other lands for oil and gas purposes, as well as for the mining of metals, is provided for by the Act of June 30, 1919, Chap. 4, Sec. 10, 41 Stat. 17, and Sec. 26, 41 Stat. 31. Without the application of these various statutes to the differ-

ent classifications of lands, the provisions of Sec. 399, U. S. C. A., Title 25, and of Sec. 10, Chap. 4, Act of June 30, 1919 (41 Stat. 17), are meaningless.

The Montana Supreme Court assumes that this lease was executed under the provisions of Sec. 398, Title 25, U. S. C. A., and that it was so construed by the Department of the Interior, because of a reference to this section found in the printed portion of the lease. However, from an examination of the lease (R. 6) it is most apparent that a form prepared for leasing strictly tribal lands was used, perhaps inadvertently, for this particular lease, and that the reference to Sec. 398 is in reality without meaning. In this connection it is to be noted that the lease is entitled "Oil and Gas Mining Lease *Tribal Indian Land.*" The actual construction of the lease by the Interior Department is set forth in a letter from the Commissioner of Indian Affairs, dated July 15, 1935, attached to the petition for rehearing (R. 43), in which he says:

> "The leases on this (the Blackfeet) reservation are authorized by the provisions contained in the Act of June 30, 1919 (41 Stat. 3-17). * * * This Act contains no authorization of a state tax on the production of minerals."

Obviously the Montana Court erred in declaring and deciding that the parties to the lease had construed it as being governed by the provisions of Sec. 398, Title 25, U. S. C. A. Since the Act of June 30, 1919, expressly authorizes the leasing of this class of land, it would seem futile to look elsewhere for other and different authorization. The interpretation of Sec. 398, to include this land, is unnecessarily strained.

B.

The petitioner, as lessee, is an instrumentality of the United States, and as such not taxable by the State.

Petitioner, as lessee, in the oil and gas lease involved, in the development and operation of these lands for oil and gas purposes, is an instrumentality and agent of the United States in fulfilling its obligations to the Indian Tribe–by lightening the burden of the guardian and better serving the needs of the wards by the revenue obtained by such operations.

Indian Territory Oil Co. v. *Oklahoma,* 240 U. S. 522, 60 L. Ed. 779.

Neither the lease nor the production therefrom, owned by petitioner as such instrumentality, can be taxed by a State without express congressional consent.

Gillespie v. *Oklahoma,* . S. 501, 66 L. Ed. 338;
Burnet v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 76 L. Ed. 815;
Indian Territory Oil Co. v. *Oklahoma,* 240 U. S. 522, 60 L. Ed. 779;
Choctaw O. & G. Railroad Co. v. *Harrison,* 235 U. S. 292, 59 L. Ed. 234;
Howard v. *Gypsy Oil Co.,* 247 U. S. 503, 62 L. Ed. 1239;
Large Oil Co. v. *Howard,* 248 U. S. 549, 63 L. Ed. 416;
Jaybird Mining Co. v. *Weir,* 271 U. S. 609, 70 L. Ed. 1113;
Metcalf & Eddy v. *Mitchell,* 269 U. S. 514, 70 L. Ed. 384;
Group No. 1 Oil Corporation v. *Bass,* 283 U. S. 279, 75 L. Ed. 1032;
Enabling Act of the State of Montana (25 Stat. 677).

C.

The Taxes Involved.

The state taxes on oil production upheld by the Montana Supreme Court are

(a) Net proceeds tax on lessor's and lessee's interest in the oil produced, provided for by Secs. 2088-2096, Revised Codes of Montana, as amended. This includes a tax on the lessor's share of the royalty oil, and is a substitute for an *ad valorem* tax on the lease.

Byrne v. *Fulton Oil Co.*, 85 Mont. 329, 278 Pac. 514. Thus it is in effect a tax on realty, as under the Montana rule the oil and gas in place does not pass by the execution of an oil and gas lease, which is an interest in real property.

Homestake Exploration Co. v. *Schoregge*, 81 Mont. 604, 264 Pac. 388.

(b) Gross production Tax, assessed against the lessee and based on the gross proceeds, under the provisions of Secs. 2397-2405, Revised Codes of Montana, 1921, as amended.

This is a license or occupational tax.

Mid-Northern Oil Co. v. *Walker*, 65 Mont. 414, 211 Pac. 353.

D.

The oil and gas in the lands embraced in the lease are property of the United States, not taxable by the State of Montana.

The Act of June 30, 1919, and the Trust Patents issued pursuant thereto, reserve the oil and gas in this land to the United States, and hence the oil and gas belong to and are

property of the United States; as such they are not taxable by the State.

Enabling Act for the State of Montana (25 Stat. 677);
Sec. 2, Article XII, Constitution of the State of Montana;
Sec. 2, Ordinance No. 1, State Constitution of Montana;
Chapter 98, Laws of Montana 1931;
Ford v. *The City of Great Falls*, 46 Mont. 292, 127 Pac. 1004.

Respectfully submitted,

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(7681-C)